Message

From: Deegan, Dave [Deegan.Dave@epa.gov]
Sent: 11/2/2020 9:32:01 PM
To: R1 Executives All [R1ExecutivesALL@epa.gov]
Subject: FW: Daily News Clips: Afternoon Edition, 11/2/20

From: Kibilov, Nicholas
Sent: Monday, November 2, 2020 4:31:57 PM (UTC-05:00) Eastern Time (US & Canada)
To: AO OPA OMR CLIPS
Subject: Daily News Clips: Afternoon Edition, 11/2/20

Daily News Clips: November 2, 2020 (afternoon edition)

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Bay Journal: Added cleanup for pollution behind Conowingo Dam will cost $53 million a year. Who will pay for it?
The Hill: Supreme Court weighs public records law as Sierra Club challenges FOIA exemptions

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A Staff Slams Trump's Anti-Diversity Orders: 'They Are Punitive And Demeaning'

https://www.huffpost.com/entry/epa-trump-diversitty_n_5f9c6e7cc5b6cfec2f6d844b
By Alexander C. Kaufman and Emily Peck
2 Nov 2020

Agency employees signed on to the most vocal condemnation from within the government of the president's orders yet.

Environmental Protection Agency staffers are organizing against President Donald Trump's recent executive order banning diversity trainings, mounting what may be the fiercest opposition to Trump administration policy from within to date.

By Monday morning, at least 80 employees in the agency's Office of General Counsel — more than one-third of staffers there — signed on to a statement warning that Trump's move will "result in further institutionalizing racism in the federal government" and "fly in the face of freedom of speech under the First Amendment," according to a copy of the letter HuffPost obtained. Combined, the signatories represent more than 1,000 years of service to the agency.

"We reject the approach of these directives," the letter read. "They are punitive and demeaning to federal employees, contractors, and grantees — especially those who are Black, Indigenous, and People of Color. These directives both perpetuate and amplify the harmful stereotyping they purport to discourage."

The White House issued an executive order on Sept. 22, following a segment on Fox News about diversity training that apparently caught the president's attention. The order claims that certain kinds of anti-racism and anti-sexism trainings are "un-American," particularly those that teach such concepts as systemic racism, white privilege and unconscious bias, and effectively bans all such training within the federal government and any entity that contracts with or accepts funding from the federal government.

The crackdown on trainings that have been standard in the work world for decades has been widely condemned outside the corners of Fox News and the right-wing media. Last week, two civil rights groups, represented by the NAACP Legal Defense Fund, filed suit against the administration in federal court, arguing that the order is an unconstitutional restriction on free speech and asking that the order be immediately rescinded.

Inside federal agencies, the pushback had been more quiet, with most federal workers terrified to speak up for fear of retaliation. And the letter from the EPA appears to be the most vocal condemnation of the ban from inside the government. It had been in the works for weeks as staffers weighed a response against increasingly strict guidance from the White House's Office of Management and Budget and Office of Personnel Management on how to interpret the executive orders.

The final letter, dated Nov. 1, comes less than a week after HuffPost reported that an LGBTQ Pride event inside the EPA had been canceled because of the executive order.

"The President's Executive Order makes clear that the federal government is 'committed to the fair and equal treatment of all individuals before the law' and recognizes that the fundamental tenet of our nation is 'that all individuals are created equal and should be allowed an equal opportunity under the law to pursue happiness and prosper based on individual merit,'" James Hewitt, an EPA spokesman, said in an emailed statement. "EPA is committed to maintaining fair and equal treatment of every individual who works at the Agency, and the President's Executive Order is fully consistent with these principles."

The EPA's legal department, which also carries out the agency's civil rights and ethics work, formed a task force on racism following several incidents that exposed inequities within its own office culture.

Racist incidents from 2018 cast the agency as a federal department desperately in need of introspection.

That year, someone left printouts of two apes scrolled with the N-word and the message "back to the jungle u go!" on the desk of an African American employee in the Office of Chemical Safety and Pollution Prevention, the trade publication Government Executive reported. Months later, a contractor allegedly wrote racist messages on a whiteboard in the Office of Public Affairs.

"This executive order came out and basically said the fact that we've been doing this work and creating an opportunity for some hard conversations and healing is 'un-American' and 'propaganda.'"
–EPA employee

But within the EPA's Office of General Counsel, more subtle indignities were commonplace, an employee who spoke on condition of anonymity for fear of reprisal told HuffPost. White staffers repeatedly mistook Black and South Asian colleagues for other co-workers of their same ethnicity, the employee said. Black attorneys in the office were at times presumed to be support staff. The office committee on anti-racism led talks and exercises that helped bring these issues to the fore and facilitate apologies and more respectful dialogue.

"This executive order came out and basically said the fact that we've been doing this work and creating an opportunity for some hard conversations and healing is 'un-American' and 'propaganda,'" the employee said. "So all of this nonsense hit our office particularly hard, because we had made this really deliberate choice to engage in that work that we knew needed to be done."

The orders didn't force the committee to disband. But it "drove those conversations underground," the staffer said.

"It was like the rug being pulled out from under you," the employee said. "It's had a massive, massive chilling effect."

The agency also appeared to halt work on the racial disparities in pollution that EPA Administrator Andrew Wheeler actually vowed to expand if Trump won a second term. On Friday, Sen. Tammy Duckworth (D-Ill.), Sen. Cory Booker (D-N.J.) and Rep. Donald McEachin (D-Va.) sent a letter to Wheeler demanding answers on why the EPA canceled events on environmental justice.

"As our country continues to address the coronavirus pandemic, which is disproportionately impacting members of environmental justice communities, we believe that diversity and anti-racism trainings are needed now more than ever," the lawmakers wrote. "To write off real differences in outcomes among demographic groups as merely divisive rhetoric represents a reckless refusal to do the job that the American people need and a dangerous minimization of the problem."

Barrett sits on the Supreme Court for the first argument.
https://washingtonnewsday.com/us-politics/barrett-sits-on-the-supreme-court-for-the-first-argument/
BY JONATHAN EDWARDS ON NOVEMBER 2, 2020

Judge Amy Coney Barrett attended her first Supreme Court hearing on Monday, after she took the bench last week after a controversial confirmation hearing in the Senate.

Chief Justice John Roberts welcomed her ahead of arguments in a case involving an environmental group seeking access to the EPA's records.

"It is a great pleasure on my own behalf and on behalf of my colleagues to welcome Judge Barrett to the court," said Roberts.

Barrett did not attend a series of closely watched court hearings last week, which involved disputes over the extension of postal voting due dates in Pennsylvania and North Carolina.

Monday's arguments were presented over the phone as part of the Supreme Court's coronavirus security measures. Roberts asked the first set of questions, followed by the other judges in order of seniority, with Barrett going last.

"I would like to pick up on this thread that Judge Kavanaugh has just explored with you," Barrett told Matthew Guarnieri, a Justice Department attorney who advocated the government's interest in keeping the EPA records confidential under an exemption from the Freedom of Information Act (FOIA).

"They said that if a government official would simply stamp a 'draft' on it and send it over… to circumvent the disclosure requirements of the FOIA, you said that a court could consider other factors to determine whether it was still final," she said. "What other factors would a court consider?

A decision in this case, U.S. Fish and Wildlife Service vs. Sierra Club, is expected some time before the end of the term in late June.

Barrett, who is expected to cement a conservative 6-3 majority in court for years, is likely to be subject to closer scrutiny on Wednesday when she takes part in a Philadelphia dispute in which religious rights stand against the protection of non-discrimination of LGBTQ individuals.

She may also hold a key vote in deciding further election-related litigation from Pennsylvania or other states after election day.

Everything You Need to Know About Justice Barrett's First Case at the Supreme Court
https://lawandcrime.com/supreme-court/everything-you-need-to-know-about-justice-barretts-first-case-at-the-supreme-court/
COLIN KALMBACHER Nov 2nd, 2020, 1:58 pm

U.S. Supreme Court Justice Amy Coney Barrett appeared skeptical of too much Freedom of Information Act (FOIA) sunlight during her first stab at oral arguments in an environmental law case heard on Monday.

Stylized as U.S. Fish and Wildlife Service v. Sierra Club, the dispute concerns whether internal decision-making documents are part of a formal process under the Endangered Species Act and therefore able to be accessed by the public.

The Sierra Club previously submitted a FOIA request for records relevant to years-old rulemaking done by the Environmental Protection Agency (EPA) concerning the regulation of cooling water intake structures that are harmful to endangered marine animals. The EPA denied the request but the Sierra Club sued and won in both district and appellate court. The government, which began opposing the public access effort during the Barack Obama administration and which continues to oppose public access under President Donald Trump, appealed up to the nation's high court.

The Sierra Club believes the documents are obtainable under FOIA because they reflect "formal or informal policy on how [the agency] carries out its responsibilities." The government says the documents are not obtainable because they constitute a protected "draft" under FOIA Exemption 5's "deliberate process privilege," which typically shields internal agency deliberations from public view.

The American Civil Liberties Union (ACLU), which filed an amicus brief in the dispute, says the case "presents an important opportunity for the Supreme Court to affirm the American public's right of access to documents outlining government procedures under FOIA and [to] limit the scope for which the government can claim the deliberative process privilege to keep documents secret."

While questioning the government's attorney, Barrrett leaned toward an appreciation of government trust and secrecy. Picking up on a line of questioning initiated by Justice Brett Kavanaugh, the newly-minted justice suggested a preference for a "bright-line" test or rule that would allow administrative agencies considerable leeway in self-determining whether or not a document actually qualifies as an unobtainable draft.

Here, according to the Sierra Club, the analysis within the so-called "draft" was complete–meaning the document in question was a draft in name only. Additionally, Sierra Club Managing Attorney Sanjay Narayan noted, the document itself was emailed to the EPA and made widely available throughout the agency which led to specific legal actions being made based on the analysis contained in the alleged "draft."

Politico's senior legal affairs correspondent Josh Gerstein felt that Barrett's questioning was "pretty unfriendly" toward FOIA. He argued that favoring such a bright-line rule would likely let any agency "withhold any document stamped draft regardless of underlying facts."

During her questioning, Barrett also appeared hostile to what she termed a "fact-intensive determination" that would rely on "other factors" beyond the confines of a bright-line rule that would make things easier for courts to handle.

"Or do you not want a line that is that bright?" Barrett asked the solicitor general's attorney at one point–all-but tipping her hand on the issue.

During his time at the digital dais, Narayan was also grilled by Barrett in a way suggesting she was likely to come down on the side of the government in the case.

Narayan previously outlined the Sierra Club's preferred legal test or framework, arguing that a so-called "draft" should be obtainable by the public when it has "appreciable legal consequences."

Justices Clarence Thomas, Samuel Alito and Elena Kagan set the stage for disputing that proposed framework. Each of them argued that the government should be trusted and given the benefit of the doubt when it claims a "draft" is a draft. The Sierra Club attorney pushed back against that argument, noting that the burden is actually on the government to prove that a FOIA exemption applies.
Barrett picked up that standard from her colleagues in notable fashion. She took direct issue with the "appreciable legal consequences" idea by revealing a problematic understanding of how administrative law actually works.

"How can a draft opinion give rise to that legal consequence?" she asked Narayan.

The attorney responded by noting that the relevant legal inquiry is not and should not be whether or not something is labeled a "draft" because the government could simply label any document a "draft" and summarily defeat public access petitions whenever it wanted to if that was the case. This was something that Justice Neil Gorsuch identified as a "problem" in the realm of administrative law.
Narayan responded to Barrett by saying that the court should forget about the internal labeling issue and focus on the analysis contained in the document itself. In the present case, he noted, the agency's analysis never changed and the so-called "draft" was used to reach an eventual conclusion by other agencies.

Barrett left legal onlookers with the distinct impression that she was reticent to prize the Sierra Club's arguments in the case.
Notably, liberal Justice Stephen Breyer offered a decidedly pro-FOIA perspective throughout his questioning, pointing out that the so-called "draft" was actually used by the agencies to make decisions. He also gave the appearance of being frustrated and/or pained by the government's arguments.

Oral arguments wrapped up and the case was submitted on the government's contention that only a "signed and delivered" document should qualify as a "capital-D Decision" (which is inherently FOIA-able), a position that would leave tens of thousands of agency documents out of public hands per year.

[image via Demetrius Freeman – Pool/Getty Images]
Have a tip we should know? tips@lawandcrime.com

Final EPA Guidance Procedures Effective November 18, 2020
https://www.natlawreview.com/article/final-epa-guidance-procedures-effective-november-18-2020
ARTICLE BY
Thomas C. Berger
Gregory A. Clark
Monday, November 2, 2020

On October 19, 2020, the U.S. Environmental Protection Agency (EPA) published an historic final rule that establishes Agency-wide procedures and requirements for issuing guidance documents consistent with Executive Order 13891 ("Promoting the Rule of Law Through Improved Agency Guidance Documents").[1]

As we covered in our previous article, the rule defines which documents are "guidance" subject to the rule, establishes general requirements and procedures for certain Agency-issued guidance documents, and specifies additional requirements for guidance documents determined to be "significant." The final rule defines the term "active guidance document" to mean a guidance document in effect that EPA expects to cite, use, or rely upon. Such active guidance documents must be posted to a single EPA online portal. The rule also establishes procedures for the public to petition for the withdrawal or modification of active guidance documents. Significantly, the final rule adds a procedure that was not included in the proposal, under which the public can petition the Agency for the reinstatement of a rescinded guidance document.[2]

In accordance with E.O. 13891, the rule establishes a single, searchable, and indexed EPA guidance portal for all active guidance documents. Several times this year, the Office and Management and Budget (OMB) extended EPA's deadline to finalize its guidance portal,[3] with the ultimate deadline expiring on July 31, 2020[4]. While EPA has not indicated any plans to supplement the portal with additional guidance documents, the November 18, 2020 effective date of the guidance rule may provide cover for EPA to add guidance documents to the portal in the next several weeks if requested by industry. By November 18th, any document that is "guidance" under the definitions in the rule should be considered rescinded if it is not posted in EPA's guidance portal.

As EPA developed its guidance portal, a significant point of contention and concern was the impact on EPA opinions and other correspondence that had been provided to individual companies and trade associations in response to questions regarding compliance and regulatory interpretation. For instance, EPA's "Applicability Determination Index" serves as a repository of EPA correspondence and opinions concerning the Clean Air Act, and is frequently consulted by regulated parties to understand how these provisions have been applied to other similarly situated companies. Ultimately, EPA determined that the ADI documents were not "guidance" within the scope of the E.O. and EPA's rule, and posted a clarification on the subportal for the Office of Air and Radiation (OAR):

"EPA's Office of Air and Radiation notes that certain agency documents, including statements of specific, rather than general, applicability, are excluded from the definition of guidance document under Executive Order 13891 and therefore may be excluded from this guidance portal. Specifically, EPA may exclude communications or statements regarding particular locations or facilities, and correspondences with individual

persons or entities. For the same reason, such documents are not deemed to be rescinded by virtue of the fact that they have been excluded from this portal."[5]

EPA defines the term "guidance document" consistent with the definitions in E.O. 13891 and the Office of Management and Budget's (OMB) implementing memorandum, which includes the term "technical issue." EPA states that "[d]ue to the diversity of purpose and content of scientific and technical documents, it would be inconsistent with E.O. 13891 for the EPA to categorically determine whether all scientific and technical documents are 'guidance documents.'" Accordingly, scientific and technical documents not posted to EPA's portal must be assessed on a case-by-case basis to determine whether they constitute "guidance" within the meaning of the rule and, thus, whether they are rescinded or still reliable.

The rule also sets forth procedures for the public to petition for the modification, or withdrawal of an active guidance document, or reinstatement of a rescinded guidance document. Information about petitions received (including the title of the relevant guidance document) will be made publicly available. EPA cautions that if a petition does not satisfy the content requirements specified in the rule, EPA may decide not to consider the petition under the rule. The rule states that EPA "should" respond to a petition in a "timely manner," but must respond no more than 90 calendar days from receipt. EPA may extend the response date one time for any reason but must notify the petitioner as to the basis for the extension and an estimated response date, and may not extend for more than 90 days.

For example, with respect to the Toxic Substances Control Act (TSCA), EPA's guidance portal includes more than 170 documents.[6] This list includes critical documents on Inventory representation (e.g., TSCA nomenclature), as well as more than ten fact sheets impactful to the 2020 TSCA section 8(a) Chemical Data Reporting Rule. But, as is the case for Clean Air Act "guidance," many of the most instructive interpretations from the Agency have been provided over the years to individual companies. While the Office of Chemical Safety and Pollution Prevention (OCSPP) subportal does not include a similar clarification as the OAR statement quoted above, similar logic would suggest that companies can and should continue to rely on the historical interpretations provided by Agency staff.

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[1] EPA Guidance; Administrative Procedures for Issuance and Public Petitions, 85 Fed. Reg. 66,230 (Oct. 19, 2020).
[2] 84 Fed. Reg. at 66, 239; cf. EPA Guidance; Administrative Procedures for Issuance and Public Petitions, 85 Fed. Reg. 31,104 (May 22, 2020).
[3] By February 28, 2020, each Federal agency was to review and rescind any current unnecessary guidance, provide a mechanism for the public to petition for withdrawal or modification of guidance, and (per the October 31, 2019 Office of Management and Budget implementing memo) establish a single, searchable, indexed website that contains, or links to, all of the agencies' respective guidance documents currently in effect. See "Memorandum for Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions, available at: https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-M... EPA announced the availability of its public guidance portal on February 28, 2020. Notice of Public Guidance Portal, 85 Fed. Reg. 11,986 (Feb. 28, 2020).
[4] 84 Fed. Reg. at 66,233.
[5] Guidance Documents Managed by the Office of Air and Radiation, available at: https://www.epa.gov/guidance/guidance-documents-managed-office-air-and-r....
[6] See Guidance Documents Managed by the Office of Chemical Safety and Pollution Prevention (OCSPP), available at: https://www.epa.gov/guidance/guidance-documents-managed-office-chemical-....

Groups Sue EPA Over Flares At Industrial Facilities

https://www.wesa.fm/post/groups-sue-epa-over-flares-industrial-facilities#stream/0
By REID FRAZIER | STATEIMPACT PENNSYLVANIA
2 NOV 2020

Environmental groups are suing the federal government over air pollution from flares at gas processing plants and other industrial facilities.

The EPA is supposed to update its requirements for industrial flares every eight years, but environmental groups say the agency hasn't done so in over 20 years.

In a lawsuit filed in U.S. District Court for the District of Columbia, the groups are asking the EPA to conduct a review and update the regulations.

The lawsuit says the result of the EPA's current standards are releases of "larger quantities of pollutants that are toxic, smog-forming, or otherwise hazardous to the health of nearby communities" which are "disproportionately located in and near communities of color and lower-income communities."

Flares are used to burn off excess gases at natural gas processing stations, landfills, and other sites. If done properly, flaring can eliminate nearly all hazardous pollutants in the gases they burn.

But the groups say flares at some facilities are faring far worse than that.

An EPA estimate of ethylene plants found that flares were destroying only about 90 percent of the pollutants in the gas.

"And what you really want is you want to flare operating with 98 percent efficiency or above," said Adam Kron, an attorney with the Environmental Integrity project, one of the groups suing the EPA.

Kron said plants will often inject steam into their flares to suppress smoke. But if too much steam is injected, the flares will not burn hazardous pollutants that can be in the waste stream.

"Flares destroy those pollutants and prevent them from getting out there. So if the flares aren't actually doing that, you're winding up with just multiple times more pollutants," Kron said.

An agency spokesperson said the EPA does not comment on pending litigation.

This story is produced in partnership with StateImpact Pennsylvania, a collaboration among WESA, The Allegheny Front, WITF and WHYY.

EPA Administrator: RFS Waiver Requests to Wait on Court Appeal
https://www.agprofessional.com/article/epa-administrator-rfs-waiver-requests-wait-court-appeal
John Herath
November 2, 2020 02:16 PM

The Environmental Protection Agency (EPA) is considering 35 oil refiner requests to waive required blending of renewable fuels, namely ethanol, for the 2019 and 2020 calendar years, according to reporting data on the EPA website. Those waiver requests will not be considered until the courts weigh in on a pending court appeal, according to EPA Administrator Andrew Wheeler.

The Tenth Circuit Federal Appeals Court in January ruled EPA could not grant Renewable Fuels Standard (RFS) waivers for refiners whose earlier, temporary waivers had lapsed. The oil industry has since appealed that ruling.

Wheeler said on the AgriTalk Radio Show on Monday that he will not consider those waiver requests until after the courts have spoken on that appeal.

"The refiners appealed that to the Supreme Court; we're waiting to see if they take it up, and what they do with that," Wheeler said. "What I don't want to be in a position of doing is making a decision one way or the other and then have the court instruct me to reverse it, because it's much worse to reverse a decision afterwards than it is to just wait for the court to decide. So, I think it would be inappropriate for me to either grant or deny them until that litigation has completely run its course."

EPA is also considering an additional 17 so-called "gap year" waiver requests, an attempt to get around the Tenth Circuit decision by filling in the years between the initial waiver requests and the current waiver applications. Wheeler said those applications cannot be ruled on by EPA until the Department of Energy completes its review of the requests. EPA earlier this year denied 54 gap year waiver requests and is widely expected to do the same with the remaining 17.

But the hold on the 2019 and 2020 waivers was met with concern from the Renewable Fuels Association (RFA).

"It's not surprising to hear this excuse from EPA, but it is disappointing," RFA President and CEO Geoff Cooper told AgWeb. "EPA knows as well as anyone that the chances of the Supreme Court deciding to review the Tenth Circuit decision are incredibly low. The Agency itself didn't seek an appeal in the Tenth Circuit or in the Supreme Court, which tells me they know the odds of an appeal succeeding are slim to none. It's time to move forward and put an end to the uncertainty and instability that have plagued EPA's management of the RFS for the past year. EPA should immediately reject the 17 remaining 'gap year' waiver petitions, adopt the Tenth Circuit decision nationwide, and immediately apply the decision to the 35 pending requests for 2019 and 2020 compliance exemptions. Enough is enough."

Attorney General Becerra Continues to Push EPA to Complete Required Evaluation of Pesticide Toxic to Pollinators, like Bees, Critical to Agriculture

https://www.einnews.com/pr_news/529826685/attorney-general-becerra-continues-to-push-epa-to-complete-required-evaluation-of-pesticide-toxic-to-pollinators-like-bees-critical-to-agriculture

NEWS PROVIDED BY

Office of the Attorney General California Department of Justice

November 02, 2020, 20:43 GMT

SACRAMENTO – California Attorney General Xavier Becerra today urged the Environmental Protection Agency (EPA) to revise and recirculate its draft risk assessment of flonicamid, a pesticide toxic to pollinators like bees which are critical to agriculture. Despite evidence showing that flonicamid poses a higher risk to pollinators than previously understood, the EPA has repeatedly failed to collect data from required follow-up studies and continues to move forward with the registration process despite significant information gaps. Earlier this year, Attorney General Becerra expressed concern over the EPA's risk assessment and manufacturer ISK Biosciences' application for new uses of flonicamid. In today's comment letter, Attorney General Becerra once again urges the EPA to review the forthcoming follow-up studies, revise its ecological risk assessment, propose any necessary mitigation, and circulate its findings for public comment prior to issuing a registration decision.

"The Trump Administration's EPA is failing at one of its most basic jobs by plowing ahead with the registration process for flonicamid before receiving additional data on its impact to pollinators like bees," said Attorney General Becerra. "California relies on pollination from bees for agriculture, a driving force of our state's economy. We cannot ignore the environmental and economic implications of this decision – and the EPA cannot ignore its responsibilities under the law. The EPA must do its homework before it allows flonicamid to be used for another 15 years."

Under the Federal Insecticide, Fungicide, and Rodenticide Act, all pesticides must receive regulatory approval from the EPA before they are put into use. The EPA reviews pesticide registration every 15 years to ensure registration is based on current information regarding the health and environmental impacts of a pesticide's use. Many pesticides, including flonicamid, have come under increasing scrutiny in recent years for their adverse health and environmental effects. Flonicamid is a pesticide that manages crop pests by preventing them from eating, causing insects to die of starvation or dehydration. New studies submitted by ISK show that the application of the pesticide to crops exposes bees to up to 51 times the amount of flonicamid that would cause them substantial harm, posing significant risks to these pollinators.

Flonicamid's potential adverse effects on pollinators are of critical concern in California, where pollinators play a critical role in the environment and the economy. Pollination by native bees increases the United States' agricultural output by more than $3 billion each year, and over a third of the country's vegetables and two-thirds of the country's fruits and nuts are grown in California. Studies show that crop yields increase substantially in areas with denser native bee populations. Yet studies also show that California's major agricultural regions, such as the Central Valley, have experienced some of the steepest declines in native bee populations anywhere in the country.

On September 2, 2020, the EPA released a Proposed Interim Registration Review Decision for flonicamid that again failed to include and consider additional, required pollinator studies necessary for a registration decision. While the EPA claims that ISK has committed to conducting these studies, it has not committed to reviewing the data from these studies before issuing a final interim decision. In the comment letter, Attorney General Becerra argues that the EPA must gather the necessary data, describe flonicamid's risks to pollinators, and recirculate its draft ecological risk assessment before re-registering flonicamid.

A copy of the comment letter can be found here.

EPA excludes 'zone requirements' for pesticide applications
https://www.thefencepost.com/news/epa-excludes-zone-requirements-for-pesticide-applications/
2 Nov 2020
-The Hagstrom Report

Environmental Protection Agency Administrator Andrew Wheeler on Thursday announced that the agency has changed the regulation for the application of pesticides so that the Application Exclusion Zone applies only within the boundaries of the agricultural establishment and not off the farm.

The change also exempted immediate family members of farm owners from all aspects of the AEZ requirements. EPA said the change means that "farm owners and their immediate family are now able to shelter in place inside closed buildings, giving farm owners and immediate family members flexibility to decide whether to stay on-site during pesticide applications, rather than compelling them to leave even when they feel safe remaining."

The regulation added new clarifying language so that pesticide applications that are suspended due to individuals entering an AEZ may be resumed after those individuals have left the zone, and simplified criteria to determine whether pesticide applications are subject to the 25- or 100-foot zone.

"Today's revisions are consistent with the 2018 Pesticide Registration Improvement Act (PRIA)," EPA said. The AEZ requirements are part of EPA's agricultural Worker Protection Standard regulations.

"Since Day One, the Trump administration has been committed to protecting the health of all our citizens," said Wheeler. "The changes to the AEZ requirements make it easier to ensure people near our nation's farms are protected, while simultaneously enhancing the workability of these provisions for farm owners and protecting the environment."

EPA noted that the original regulation was enacted in 1992 under EPA's Federal Insecticide, Fungicide, and Rodenticide Act authorities to protect farm workers from pesticide exposures in production agriculture.

The Worker Protection Standard requires owners and employers on agricultural establishments and commercial pesticide-handling establishments to protect employees on farms, forests, nurseries, and greenhouses from occupational exposure to agricultural pesticides.

In 2015, EPA revised the regulation to require agricultural employers to keep workers and all other individuals out of an area called the "application exclusion zone" (AEZ) during outdoor pesticide applications.

The AEZ is the area surrounding pesticide application equipment that exists only during outdoor production pesticide applications, and is described as 25 feet in all directions for ground pesticide applications when sprayed from a height greater than 12 inches, and 100 feet in all directions for outdoor aerial, air blast, air-propelled, fumigant, smoke, mist and fog pesticide applications.

NIST Researchers Advance Efforts to Accurately Measure Glyphosate Pesticide in Common Foods
https://www.miragenews.com/nist-researchers-advance-efforts-to-accurately-measure-glyphosate-pesticide-in-common-foods/
NOVEMBER 3, 2020 4:42 AM AEDT

Pesticides help farmers increase food production, reduce costly damage to crops, and even prevent the spread of insect-borne diseases, but since the chemicals can also end up in human food, it's essential to ensure that they are safe. For a commonly used pesticide known as glyphosate, concerns exist over how high a level is safe in food as well as the safety of one of its byproducts, known as AMPA. Researchers at the National Institute of Standards and Technology (NIST) are advancing efforts to measure glyphosate and AMPA accurately in the oat-based food products where they frequently appear by developing reference materials.

The Environmental Protection Agency (EPA) establishes tolerances for pesticide levels in food that are still considered safe for consumption. Food manufacturers test their products to make sure they meet EPA regulations. But in order to make sure their measurements are accurate they need a reference material (RM) with known levels of glyphosate with which to compare their products.

There is no reference material available for measuring glyphosate, the active ingredient in the commercial product Roundup, in the oatmeal or oat-based products in which the pesticide is heavily used. However, there are a small number of food-based RMs available for measuring other pesticides. In efforts to develop one for glyphosate and meet the immediate needs of the manufacturers, NIST researchers have optimized a test method to analyze glyphosate in 13 commercially available oat-based food samples to identify candidate reference materials. They detected glyphosate in all the samples, and they also found AMPA (short for aminomethylphosphonic acid) in three of the samples.

The researchers have published their findings in the journal Food Chemistry.

For decades, glyphosate has been one of the most dominant pesticides in the United States and worldwide. In 2014 alone, 125,384 metric tons of glyphosate were used in the U.S, according to a 2016 study. It is a herbicide, a type of pesticide for destroying weeds or unwanted plants that are detrimental to crops.

Sometimes pesticides remain in small amounts, known as residues, on food produce. In the case of glyphosate, it can also break down into AMPA, which can also remain on fruit, vegetables and grains. The potential effects of AMPA on human health are not well understood and remain an active area of study. Glyphosate is also heavily used on other cereals and grains such as barley and wheat, but oats are a special case.

"Oats are unique, as grains go," said NIST researcher Jacolin Murray. "We chose oats as our first material because food producers use the glyphosate as a desiccant to dry out the crop before they harvest it. Oats tend to have a high amount of glyphosate." Crop desiccation allows for an earlier harvest and improves uniformity of crops. Because of its wide use, glyphosate is typically found at higher levels compared with other pesticides, according to co-author Justine Cruz.

The 13 oat samples in the study included oatmeal, slightly to highly processed oat-based breakfast cereals, and oat flour from conventional and organic farming practices.

Credit:
J. Murray/NIST
Samples of oatmeal and oat-based products analyzed for glyphosate and AMPA.

The researchers analyzed the samples for glyphosate and AMPA using a modified method of extracting glyphosate from solid food, in conjunction with standard techniques known as liquid chromatography and mass spectrometry. In the first method, the solid sample is dissolved into a liquid mixture where glyphosate is removed from the food. Next, in liquid chromatography, the glyphosate and AMPA in the extract sample are separated from other components in the sample. Finally, mass spectrometry measures the mass-to-charge ratio of ions to identify the different chemical compounds in the sample.

Their results showed that the lowest levels of glyphosate were detected in the organic breakfast cereal sample (26 nanograms per gram) and organic oat flour sample (11 nanograms per gram). The highest levels of glyphosate (1,100 nanograms per gram) were detected in conventional instant oatmeal samples. AMPA levels were much lower than glyphosate levels in both organic and conventional oatmeal and oat-based samples.

All glyphosate and AMPA levels in the oatmeal and oat-based cereals were well below the EPA tolerance of 30 micrograms per gram. "The highest glyphosate levels we measured were 30 times lower than the regulatory limit," said Murray.

Based upon the results of this study and initial discussions with stakeholders interested in using a RM for oatmeal and oat-based cereals, the researchers discovered that it might be beneficial to develop a low-level RM (50 nanograms per gram) and high-level one (500 nanograms per gram). These RMs would be beneficial to agricultural and food testing labs as well as food producers, who need to test their source material for pesticide residues and to have an accurate standard against which to compare their measurements.

NIST's RMs are used not just in the United States but also worldwide, so it was important for researchers also to consider the regulatory limits abroad, such as in Europe, where the limit is 20 micrograms per gram.

"Our researchers have to balance the needs of food testing labs based in the U.S. and beyond to make reference materials with a global reach," said NIST researcher Katrice Lippa.

Researchers were able to identify three potential RM candidates for glyphosate in oat-based cereals and two candidates for AMPA. They were also able to conduct a preliminary stability study that showed glyphosate was

stable in oats over a six-month period at a consistent temperature of 40 degrees Celsius, which is important in developing a future RM, which could potentially be based on one or more of these products.

Next, the researchers plan to evaluate the feasibility of the RMs through an interlaboratory study and then conduct more long-term stability studies of both glyphosate and AMPA in their materials. The NIST team will continue to engage stakeholders to make sure that the RM will meet their needs.

Paper: Justine M. Cruz and Jacolin A. Murray. Determination of glyphosate and AMPA in oat products for the selection of candidate reference materials. Food Chemistry. In press. DOI: 10.1016/j.foodchem.2020.128213

Tags:Chemical, EPA, Europe, Farming, future, Human, NIST, organic, press, production, Safety, study, technology, testing, United States, vegetables

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Researcher finds pesticide label discrepancies, could hurt honey bees
https://www.capitalpress.com/ag_sectors/orchards_nuts_vines/researcher-finds-pesticide-label-discrepancies-could-hurt-honey-bees/article_33a74f9c-1acb-11eb-9e3d-6f9768068106.html
By SIERRA DAWN McCLAIN Capital Press
2 November 2020

More than 30% of pesticide labels fail to follow Environmental Protection Agency recommendations and provide incorrect information about their toxicity to pollinators, according to a study by Oregon State University Extension Service.

Experts say inconsistent labels may cause unintentional pesticide misuse, which could threaten honey bees, worth some $20 million to American agriculture.

The research, experts say, may help regulators identify labels that need amending. In the meantime, it has prompted OSU Extension to offer better education to pesticide applicators.

The discovery was made by an unsuspecting young student.

"I kind of stumbled onto this research project by accident," said Matthew Bucy, a pesticide registration specialist at the Oregon Department of Agriculture.

Bucy is a recent OSU graduate. As an undergraduate honors student last year, his job was to read through hundreds of pesticide labels and update a data table. The work was tedious, and Bucy said he did not anticipate his big discovery.

After studying 232 insecticide labels, Bucy said a pattern became clear. About a third of the labels deviated from EPA recommendations. Many, for example, didn't list accurate details about their residual or acute toxicity.

Bucy's accidental discovery evolved into a major research project that didn't end when he graduated.

Rose Kachadoorian, pesticide specialist at ODA and formerly an adviser on Bucy's thesis committee, said the pesticides weren't misbranded or mislabeled intentionally; they were simply outdated.

"They're just old. A lot of the language is what we call legacy language," said Kachadoorian.

Kachadoorian said the problem of outdated labels seems to stem from the fact that the EPA is continuously short-staffed.

Kachadoorian, Bucy and experts at the American Association of Pesticide Control Officials formed a working group to address the labeling problem, but because EPA is understaffed, the researchers say they expect changing label language will take time.

Kachadoorian said her vision is also to create a more standardized labeling system for pesticides. Look at FDA pharmaceutical labels, she said, and they all have similar formatting. You know where to look on the label to find things like dosage and possible side effects. But pesticide labels look different across companies, making information harder to find. Kachadoorian's working group will encourage more consistency.

In the meantime, the researchers say ODA and OSU are working to improve applicator education workshops and materials to include information about how to interpret a label that doesn't adhere to EPA recommendations.

Andony Melathopoulos, assistant professor and pollinator specialist for OSU Extension, has trained more than 6,700 applicators in Oregon since 2018 and plans to train more with the new information.

The researchers encourage farmers to take advantage of recertification courses, educational materials and events so they will be better equipped to protect pollinators.

Bucy said his groundbreaking research as a student led to his job in pesticide work at ODA, where he hopes to continue helping the agricultural community.

"I read a few hundred labels. Why not read a few hundred — or thousand — more?" he said.

Justices Fret Over FOIA Evasion but Debate Sierra Club Standar
https://news.bloomberglaw.com/environment-and-energy/justices-fret-over-foia-evasion-but-debate-sierra-club-standard
By Ellen M. Gilmer
2 Nov 2020

The U.S. Supreme Court seemed wary Monday of limiting government disclosure requirements, but unsure where to draw the line in a complex clash over Endangered Species Act records.

The case, U.S. Fish and Wildlife Service v. Sierra Club, has big implications for government transparency, in environmental contexts and beyond. It attracted even broader interest as newly confirmed Justice Amy Coney Barrett sat for oral argument for the first time.

Hearing the case remotely, Barrett and her colleagues pressed both sides to explain what legal test the high court should apply when deciding whether draft documents are subject to public disclosure under the Freedom of Information Act. The dispute centers on federal wildlife agencies' draft opinions that a proposed EPA regulation would harm endangered species.

"I think there's a concern lurking in this case that executive branch officials might just stamp 'draft' on everything and therefore avoid FOIA," Justice Brett Kavanaugh said.

Kavanaugh was echoing the Sierra Club's position—backed by other environmentalists, industry groups, and media advocates—that a ruling for the government would allow agencies to skirt disclosure requirements.

But he and other justices stopped short of embracing the group's views, in light of the government's contention that the records at issue were far from being finalized.

"We're just very, very far from that here," assistant to the U.S. solicitor general Matthew Guarnieri told the court. "Here, we are in the molten core of the deliberative process privilege where it's clear from the record that the agencies" didn't adopt the conclusions from the draft.

The records at issue fall under a FOIA exemption for government documents that are pre-decisional, and part of an agency's deliberative process, Guarnieri said.

'Legal Consequences'

The years-long dispute before the Supreme Court started when the Environmental Protection Agency issued a 2011 proposed regulation for cooling water intake structures at power plants. The federal agencies that oversee species impacts—the Fish and Wildlife Service and the National Marine Fisheries Service—drafted opinions that said the proposal was likely to harm threatened and endangered species.

The EPA then revised its proposal, and the wildlife services declared the regulation would cause "no jeopardy" to rare animals and plants. The Sierra Club used FOIA to get internal records from that decision-making process, and the agencies withheld the earlier draft opinions.

The U.S. Court of Appeals for the Ninth Circuit in 2018 ordered the government to turn over the records, and the Supreme Court agreed to review the case this year.

Some of the Sierra Club's typical legal foes, including the National Association of Home Builders and the American Forest Resource Council, are backing the environmental group in the case, focused on protecting their own access to government documents that steer major regulatory decisions.

Sierra Club lawyer Sanjay Narayan argued the Supreme Court should rule that FOIA requires disclosure of draft documents when they have "appreciable legal consequences."

'Tailor-Made'

In the rulemaking process at issue in the case, the EPA changed its regulation after the wildlife agencies drafted their findings about harm to endangered species, Narayan said. The agencies virtually never put such "jeopardy findings" in final form, so drafts function as a final decision, he said.

The majority of justices appeared to agree that putting a "draft" label on a document isn't enough to exempt it from FOIA. But they seemed unsure about the Sierra Club's proposed test for discerning which records qualify for the FOIA exemption.

"The operative effects test seems sort of tailor-made for the facts here, but it doesn't seem to be very helpful in most cases," Chief Justice John Roberts said.

Barrett raised concerns about how to apply the "appreciable legal consequences" test, questioning whether the EPA's decision to revise its proposed regulation was simply the practical, rather than legal, consequence of hearing the wildlife agencies' initial views.

Justice Elena Kagan likewise said she was uncertain about how to judge what happened between the EPA and the wildlife agencies, given federal officials' declarations that the wildlife agencies' conclusions really hadn't been settled by their top officials.

Agencies should have some space for collaboration and back-and-forth in the rulemaking process, Justice Neil Gorsuch said. "Are you at all concerned that a more invasive rule might deter this kind of productive discussion?" he asked.

EPA official to visit brownfield sites in Oneida, Herkimer counties
https://www.timestelegram.com/story/news/2020/11/02/epa-official-visit-brownfield-sites-oneida-herkimer-counties/6126043002/
Donna Thompson
Times Telegram
2 Nov 2020

U.S. Environmental Protection Agency's Region 2 Regional Administrator Pete Lopez will be in the area Friday to visit three area brownfield sites, including the Duofold site in Ilion and the former Charlestown Mall property bordering Utica and Frankfort.

Lopez will also tour the Navigation Center at 500 Harbor Way in Rome, according to the Herkimer County Industrial Development Agency (IDA).

"We are excited to have Pete Lopez come to not only Herkimer County, but our entire region," IDA Executive Director John Piseck said in a statement. "Herkimer County is dedicated to the improvement and redevelopment of brownfield sites."

The Environmental Protection Agency's Brownfields Program provides grants and technical assistance to communities, states, tribes and others to assess, safely clean up and sustainably reuse contaminated properties.

"In communities across New York and the nation, EPA is working with local and state governments to pave the way for an effective reuse of properties that have been impacted by contamination," Lopez said in a statement. "Through its Brownfields program, EPA has leveraged over $33 billion and created more than 170,000 jobs nationwide. I am so pleased to join the Herkimer County Industrial Development Agency and our other partners for this tour as the IDA shares its program successes and highlights areas in need of additional attention and support."

The EPA Brownfields Program, which began in 1995, has provided nearly $1.6 billion in grants to assess and clean up contaminated properties, according to the IDA.

The CharlesTown complex, located on Bleecker Street, was destroyed in an Aug. 27 fire after years of smaller fires and vandalism. Built in the early 1900s, the structure fell into disrepair in the early 2000s. Prior to the August fire, a developer was planning to remove and sell the brick and timber from the complex and clear the site for future development, officials have said.

With the Duofold site, environmental consultants took soil samples in Ilion in late August as part of the second phase of the Environmental Site Assessment for a brownfield redevelopment project. Cleanup is the next step at the site, which has been vacant for more than two decades, said John Piseck, executive director of the Herkimer County IDA. The village of Ilion purchased the Duofold property in March 2019.

The Navigation Center in Rome opened in 2017 in Bellamy Harbor Park in the city's Erie Canal waterfront.

Donna Thompson is the government and business reporter for the Times Telegram. For unlimited access to her stories, please subscribe or activate you digital account today. Email her at donna@timestelegram.com.
Remington Arms employees return to workSome Remington Arms employees are back to work after the Ilion plant temporarily closed last month as part of the state's effort to reduce the spread of the coronavirus.Herkimer County Legislature Chairman Vincent Bono said Tuesday it was unclear how many workers returned to their positions at the gTimes Telegram
Man killed in Herkimer Co. Thruway crashA man was killed in an early Wednesday morning in a motor vehicle crash on the state Thruway in the town of Herkimer, state police said.It happened around 6:30 a.m. on the westbound lanes when Eusterio A. Rodriguez Martinez, 31, of Bronx, was operating a tractor-trailer and for an unknown reason exiTimes Telegram
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Trucking companies' illegal dumping destroys nearly 20 acres of sensitive wetland
https://cdllife.com/2020/trucking-companies-illegal-dumping-destroys-nearly-20-acres-of-sensitive-wetland/
By Wimberly Patton
November 2, 2020

Two companies have been fined and tasked with the restoration of nearly 20 acres of wetland damaged by their years of illegal dumping.

Back in 2008, Bobby Wolford Trucking & Salvage, Inc. began delivering fill material and construction debris to Karl Frederick Klock Pacific Bison, LCC three miles east of Monroe, Washington.

For the next three years, Bobby Wolford Trucking & Salvage, Inc. proceeded to dump enough fill material and construction debris into the property's wetlands to fill 16 Olympic swimming pools, along with an immeasurable amount of debris into the Skykomish River and various other streams running through the property.

Bobby Wolford Trucking & Salvage, Inc. also took further advantage of its access to the Klock property by charging other companies to dump their waste materials in the same locations – all without obtaining any sort of permits, reports Herald Net News.

According to the Environmental Protection Agency (EPA), the illegal dumping directly impacted three acres of wetlands and more than 2,000 feet of streams. These changes have altered the "structure and function" of the floodplain, and as a result, 17 acres of wetland are in need of salvaging.

"This affected the very structure and function of the Skykomish River floodplain and one of its tributaries," said Chris Hladick, EPA regional administrator.

Since the discovery of the illegal dumping, the U.S. Department of Justice and the EPA have reached a settlement with Bobby Wolford Trucking & Salvage, Inc. – The trucking company must pay $300,000 in civil penalties and will be required to perform extensive restoration work to the damaged land. This restoration work will include the removal of 40,000 cubic yards of fill and debris from the oxbow of the Skykomish River and nearby wetlands. The trucking company will also be required to pay for the replanting of native vegetation destroyed by the dumping.

Because this land is home to multiple threatened species of fish, including Steelhead, Chum, Coho, Pink and Chinook salmon as well as Bull Trout, its restoration is crucial to the health of the land, so the nearby Tulalip Tribes will be overseeing the restoration work, as well as replanting 17 acres of the damaged property.

The settlement has also facilitated the transfer of 188 acres of the Karl Frederick Klock Pacific Bison, LLC property to the Tulalip tribes, who will maintain the land in "perpetual conservation."

"It's gratifying that the case has been resolved in a way that provides such benefit to the environment," Hladick said.

EPA Rated Ranges For All U.S Electric Model Cars
https://enrg.io/epa-rated-ranges-electric/
2 Nov 2020

The electric vehicle market is now blooming with variety. As a customer, you'd want to spend your money on the best electric car. For many people, the best car means the car that has the best driving range.

The driving range is a measure of how far the car can go until it runs out of juice and completely stops. But, how do we actually know the car's true driving range before we buy it? Should we trust automobile manufacturers driving range numbers? How do they even get those numbers?

The United States Environmental Protection Agency (EPA)

As with any measurement system, a standardized metric is generally a good idea. For electric vehicles, each country or region usually has its own standards. Out of all EV range standards, many favor the US EPA rating system because it is more comprehensive than the rest.

EPA-Rated Range

Every vehicle must undergo a series of tests to achieve its EPA-rated range. The general testing procedure is to charge the battery fully, park the vehicle overnight, and then, the following day, drive the vehicle over successive city cycles until the battery is empty.

After running successive city cycles, the battery is then recharged from a normal AC source, and the vehicle's energy consumption is determined (in kW-hr/mile or kW-hr/100 miles) by dividing the kilowatt-hours of energy needed to recharge the battery by miles travelled by the vehicle. The recharge energy includes any losses due to inefficiencies of the manufacturer's charger.

The city driving range is determined by the number of miles driven over the city cycle until the vehicle can no longer follow the driving cycle.

The motivation behind the EPA's rating is to give a strong basis for comparing electric vehicles. There are three EPA testing environments:

City

This estimate represents how people drive electric vehicles daily as they commute in cities. This test includes driving in the morning and driving in the busy traffic, following stoplights, and other road signs.

Highway

This estimate represents how people drive electric vehicles on interstate highway roads. The highway usually has free-flowing traffic with no stops, but moderate-to-high wind speeds, which put the car's aerodynamic prowess to the test.

The testing method is the same with the City testing method, but instead of city streets, the car is driven on highways.

Combined

This estimate represents a combination of City and Highway tests, with a 55% to 45% ratio respectively.

After the vehicle completes these tests, the vehicle will receive an EPA-rated driving range, as well as EPA-rated fuel efficiency. Please take a look at this official document for a complete guide and all-electric vehicle EPA-rated figures.

The Most Important Figure

The EPA produces a figure that says X miles. It will always be the 'number' people search for. That's the driving range of the electric vehicle. The driving range is a measure of how far an electric car can go until the battery is depleted. There are three factors determining an electric car's drive range:

The Car Specification

This includes the battery capacity, engine efficiency, total body weight, and temperature management system. For example, the Tesla Model 3 has a 54 kWh Lithium-Ion battery on the base model. It weighs 1.611kg, including the electric motor that weighs 46kg.

Environment

One of the most impactful factors for an EV is the temperature. Low temperatures make batteries suffer and perform worse. Another factor is the wind. Massive wind speeds will increase the vehicle's drag, thus, wasting energy and reducing the driving range.

Driver

The driver also plays a part in determining the driving range. Low speeds will make the battery last longer because of less friction. High speeds will drain the battery faster because aerodynamic drag increases exponentially as the car goes more quickly. Alternating rapidly between low and high speeds will drain the

battery fastest. Improper battery management, like not preheating your car before going out, can also impact battery health.

Conclusion

With the surge in the popularity of electric vehicles, consumers need a standardized measurement for an electric vehicle's driving range. The United States Environmental Protection Agency (EPA) created the EPA-rated range. The EPA has several testing procedures that mimic closely to the real-life usage of an electric car. However, because there are so many environmental and user usage factors the EPA could not cover, it's wise to assume the real driving range is slightly less than the EPA-rated range. The Tesla Model S Long Range Plus holds one of the highest EPA ratings, with 647km combined (55% city driving and 45% highway driving) and 111mpge fuel efficiency.

Added cleanup for pollution behind Conowingo Dam will cost $53 million a year. Who will pay for it?
https://www.bayjournal.com/news/pollution/added-cleanup-for-pollution-behind-conowingo-dam-will-cost-53-million-a-year-who-will/article_b696b502-1d32-11eb-a879-c726ea2a949c.html
Karl Blankenship
Nov 2, 2020 Updated 22 min ago

The cost to reduce the added nutrient pollution spilling over the Conowingo Dam now has a price tag: at least $53 million a year.

That's the rough estimate contained in a draft strategy aimed at finding ways to offset the additional nutrients passing though the dam to the Chesapeake Bay, now that the dam's 14-mile long reservoir is filled with sediment.

The Susquehanna River flows through the Conowingo Dam, 10 miles upstream from the Bay. A draft strategy for reducing an increased load of pollution from behind the dam is open for public comment until Dec. 21.
Dave Harp

The dam is located on the Susquehanna River in Maryland 10 miles upstream of the Bay. Most of the cleanup work proposed in the draft plan, released for comment Oct. 14, would take place upstream in Pennsylvania, primarily on farms.

The plan envisions attracting private investors to front the money needed to jump-start the work but said that will only happen if the states and U.S. Environmental Protection Agency commit to paying them back — something that has not happened so far.

Beth McGee, director of science and agricultural policy at the Chesapeake Bay Foundation, said she liked much of the proposed strategy, but said its success depends on whether the state-federal Bay Program comes up with a way to pay for it. "It's only a plan," she said. "If it doesn't get implemented, we're no better off."

The dam, completed in 1929, actually helped to reduce Bay pollution for decades by trapping sediments and associated nutrients. It's long been known that the reservoir would eventually fill, allowing sediment and nutrients to flow more freely into the Chesapeake. When the latest Bay cleanup plan was drafted in 2010, though, that wasn't expected to occur until after the 2025 deadline that states are striving to meet.

But that has already happened, and computer models estimate an additional 6 million pounds of nitrogen and 260,000 pounds of phosphorus now reach the Bay in a typical year.

That's enough to keep the Chesapeake's 2025 clean water goals out of reach.

With states already struggling to meet their individual pollution reduction goals, the Bay Program in 2018 decided to have an outside group develop a separate plan to offset nutrient increases from the dam and come up with a way to finance it.

Last year, the EPA awarded nearly $600,000 to the Center for Watershed Protection, Chesapeake Conservancy and Chesapeake Bay Trust to tackle the job.

"It's a massive lift," said Bryan Seipp, a watershed planner with the Center for Watershed Protection, who led the team. "It took decades and decades for this material to build up behind the dam. Trying to solve a problem that took decades to create in a fraction of that time is a challenge."

The team examined nearly a dozen options, some of which included actions outside the Susquehanna watershed that would achieve the same benefits to the Bay, before settling on the recommended strategy. Most of the other options cost more — one came in at $368 million a year.

The lowest cost strategy came in at $49.5 million dollars annually but relied solely on reductions from agricultural lands in the Susquehanna basin. Seipp said that raised concerns that an overreliance on agriculture would result in taking too much farmland out of production.

The selected plan focuses entirely on the Susquehanna watershed — primarily in Pennsylvania. It also identifies places where nutrient control actions would be most effective and suggests more than a dozen on-the-ground pollution control practices that would be the most cost-effective to implement.

The plan still relies mostly on agriculture, but also seeks a sliver of nutrient reductions from developed lands.

The strategy cautioned, though, that its estimated costs are "likely low." They do not include, for example, the cost of providing technical support staff to work with landowners on runoff control practices.

The draft also opened the door to other alternatives, such as dredging built-up sediment from behind the dam. Maryland is planning a pilot study to determine whether that is feasible.

It also raises the possibility of extending the deadline for meeting Conowingo goals beyond 2025.

Seipp said there is no firm timeline to issue a final strategy. That, he said, would hinge on public comments that may require plan revisions, as well as more clarity about funding.

A separate financing strategy will be released in December that is intended to identify ways to attract private money to support the plan.

That would spare cash-strapped states from having to pay up front and could speed implementation. But, the draft plan cautioned, "The only way that private investors will make money, at least in the near future, is if the public sector is compelled, for whatever reason, to pay them back for their investments."

Although states in the watershed chipped in funding to help develop the plan, there has been no commitment about who would ultimately pay for the actual work.

The team writing the financing strategy said in a Sept. 23 memo that it assumes the Bay states "will have the ultimate responsibility" for funding the plan. Without that commitment, it said, implementation "will be very limited in scale and impact."

Some state officials have hoped that other funding mechanisms will arise, such as philanthropic support that doesn't need to be paid back. But efforts to lure outside money have been elusive.

At the time that the Bay Program agreed to create the Conowingo plan, state and federal officials were hoping that a settlement between Maryland and Exelon — the utility that owns the dam — would generate tens of millions of dollars a year for the cleanup. The utility needs approval from the state before it can get a new federal license to operate the dam.

Earlier this year, though, the state and Exelon struck a deal that committed just $19 million over the 50-lifespan of the license for that purpose. Some environmental groups and lawmakers have sought to block that agreement from being finalized.

"We still think that they should be held accountable for their downstream impacts, and we would love to see some of their dollars go upstream as opposed to what's currently in the settlement agreement," McGee said.

The draft Conowingo Watershed Implementation Plan is open for comment until Dec. 21. Comments should be submitted to CWIP@chesapeakebay.net.

Supreme Court weighs public records law as Sierra Club challenges FOIA exemptions
https://thehill.com/policy/energy-environment/524055-supreme-court-weighs-public-records-law-as-sierra-club-challenges
BY REBECCA BEITSCH - 11/02/20 04:13 PM EST

The Supreme Court on Monday heard a case likely to have implications for whether federal agencies can withhold from the public documents showing the government's internal deliberations.

The case was brought by the Sierra Club after they were denied documents associated with an Environmental Protection Agency (EPA) water intake regulation that the Fish and Wildlife Service (FWS) initially determined would be harmful to endangered species.

The EPA took that draft opinion under advisement, ultimately drafting a rule the service found would not adversely affect protected species.

At stake in the case are the deliberations that took place at FWS and whether the government is obligated to turn over documents that can show heated debates over government policies.

The Freedom of Information Act (FOIA) allows agencies to withhold documents that show internal deliberations. This is designed to encourage frank and open discussion on policies. It's an exemption used frequently by all sorts of government agencies, often to the chagrin of reporters and public interest groups seeking to unearth the rationale behind government decisions.

But the Sierra Club argues the FWS stretched that rule too far, holding back the release of documents like its draft biological opinion that were largely final and should be public.

"The problem with the services' standard is that it boils down to 'it's privileged if we say it's privileged,'" said Sanjay Narayan, who argued the case on behalf of the Sierra Club, arguing doing so could undermine FOIA's key role: "making sure the public knows how agencies are actually using the authority Congress gave them."

"It is really important to know why the services are saying what they're saying, at least when they effectively foreclose a proposed regulation," he added in reference to the influence FWS's work had in changing the EPA's water intake rule.

The justices asked the Sierra Club to define when documents are complete enough to require release under FOIA.

Justice Neil Gorsuch posited a rule could go too far in one direction, having a cooling effect at agencies that could hinder dialogue.

"Without adequate room to kind of back down privately, the government sometimes winds up making worse decisions rather than better ones," he said, noting that EPA's second iteration of the rule was preferred by environmental groups.

"It does seem like that because of the back and forth privately, thanks to the services' intervention, EPA came up with a rule that might be better from your perspective. How do we balance that concern and allow agencies sufficient room to maneuver privately to avoid having, you know, to embarrass themselves later and allow them to save face to get to better policy results?"

The government argued such draft documents should be shielded from the FOIA process.

"The general rule here should be a clear bright-line test that, until a biological opinion is signed and formally issued, there is no final decision," argued Matthew Guarnieri, a Justice Department lawyer.

"The biological opinion here is really no different than a judge's or a court's opinion, which is not actually final until it's adopted by the judge and issued as an official opinion."

A decision in the case, U.S. Fish and Wildlife Service v. Sierra Club, is expected some time before the term ends in late June.
